

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

TIMOTHY C. HOLSWORTH, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

BPROTOCOL FOUNDATION, EYAL HERTZOG,
YEHUDA LEVI, GUY BENARTZI, and GALIA
BENARTZI,

Defendants.

No. 20-cv-02810

Honorable Alvin K. Hellerstein

**PLAINTIFF’S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR LEAVE TO FILE SURREPLY**

Plaintiff Timothy C. Holsworth, on behalf of himself and all others similarly situated, respectfully requests leave to submit the proposed surreply (attached as Exhibit 1) to Defendants’ reply in support of their motion to dismiss (ECF No. 59) (“Reply”). This surreply is appropriate because, in their Reply, Defendants argue for the first time that Plaintiff cannot satisfy the first prong of *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), based on the Second Circuit’s decision in *City of Pontiac Policemen’s & Firemen’s Retirement System v. UBS AG*, 752 F.3d 173 (2d Cir. 2014), a case Defendants do not cite in their opening brief. (Reply at 9–12). Plaintiff’s surreply appropriately explains why Defendants’ reliance in their Reply on *City of Pontiac* is wrong because it mischaracterizes both the controlling precedent and the relevant allegations regarding their listing and issuance of BNT tokens. *See Grocery Haulers, Inc. v. C & S Wholesale Grocers, Inc.*, No. 11-cv-3130 (DLC), 2012 WL 4049955, at *6 (S.D.N.Y. Sept. 14, 2012) (“Courts have broad discretion to consider arguments in a sur-reply, particularly when new arguments are put forth in a reply brief.”) (internal citations omitted); *see also DSND Subsea AS*

v. Oceanografia, S.A. de CV, 569 F. Supp. 2d 339, 347 (S.D.N.Y. 2008) (“Generally, ‘new arguments may not be made in a reply brief.’”) (quoting *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir.1999)).

Dated: November 19, 2020
New York, NY

Respectfully submitted,

/s/ Kyle W. Roche

Kyle W. Roche
Edward Normand
Velvel (Devin) Freedman
(*pro hac vice*)
Richard R. Cipolla
ROCHE CYRULNIK
FREEDMAN LLP
99 Park Avenue, 19th Floor
New York, NY 10016
Tel: (646) 350-0527
kyle@rcflp.com
tnormand@rcflp.com
vel@rcflp.com
rcipolla@rcflp.com

/s/ Philippe Z. Selendy

Philippe Z. Selendy
Jordan A. Goldstein
Oscar Shine
Mitchell Nobel
SELENDY & GAY PLLC
1290 Sixth Avenue, 17th Floor
New York, NY 10104
Tel: (212) 390-9000
pselendy@selendygay.com
jgoldstein@selendygay.com
oshine@selendygay.com
mnobel@selendygay.com

*Co-Lead Counsel and Attorneys for Plaintiff
and the Proposed Class*